Supreme Court, U.S.
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No. _____ 07-256

In The

Supreme Court of the United States

MICHAEL THOMPSON,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois First Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether it violates the Confrontation Clause of the Sixth Amendment to the United States Constitution for the State to introduce into evidence the out-of-court testimonial statement of a witness, when the witness testifies that he has no recollection of the underlying incident or the content of the statement?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The parties in the proceeding below were Michael Thompson and the State of Illinois. There is no corporation involved in these proceedings.

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OPINIONS BELOW

The opinion of the Illinois Appellate Court is unreported. The decision of the Illinois Supreme Court denying leave to appeal is reported at 2007 Ill. LEXIS 929.

JURISDICTION

The order of the Illinois Supreme Court denying leave to appeal is dated May 31, 2007. There was no petition for rehearing.

This Court has jurisdiction to consider this Petition for a Writ of Certiorari pursuant to 28 U.S.C. § 1257, in that petitioner is seeking review of a final judgment of the Illinois Supreme Court on the ground that the decisions of the Illinois courts denied him his rights under the sixth amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The sixth amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process

> for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution Amendment VI.

STATEMENT OF THE CASE

Petitioner Michael Thompson was charged in Illinois state court with the murder of Araceli Zizumbo, a bystander who was killed during a gang fight. App. 2-3

The prosecution's theory of the case was that Mr. Thompson was a leader in the Black Disciples gang, and that on June 19, 1995 he directed gang members to retaliate against a rival gang, the Krazy Get-Down Boys (KGBs) for an incident on the previous day in which a Black Disciple gang member had been attacked by the KGBs. App. 3 Three Black Disciple gang members (two of them convicted felons) testified at trial that Mr. Thompson had arranged for gang members to go to a park and directed them to shoot at KGB gang members, but all of these witnesses had given sworn pre-trial statements which contradicted all substantive aspects of their trial testimony. App. 3-6, 15-18

Mr. Thompson testified at trial that he had been a Black Disciples gang member, but had left the gang in 1994, the year before the murder of Ms. Zizumbo, and moved from Chicago to undergo job training as a truck driver. App. 8-9 Paschal Bennett, Mr. Thompson's fiancé, testified that Thompson was forced to return to Chicago because the gang was threatening her and his children, and that when he returned gang members extensively beat him to punish him for leaving the gang. App. 10

At the time of the murder, Thompson was employed full time at a fabric finishing plant, and also volunteered at a youth foundation which taught drug and gang awareness. App. 9-10 He testified that he was at the youth foundation on the night of the murder, and that he had no involvement whatsoever in planning or directing the gang retaliation or in the murder of Ms. Zizumbo. App. 9

The State produced a witness, Eugene Wiseman, who had previously pled guilty to the murder of Ms. Zizumbo. App. 6 Mr. Wiseman testified that he could not remember whether he was in a gang or where he was on June 19, 1995. *Id.* He testified that he did recall talking to two assistant state's attorneys on June 27, 1995, and stated that he recognized an exhibit, marked as People's No. 25. *Id.* He did not recall, however, whether that exhibit was a statement that he gave to the state's attorneys, although he did recall signing the statement and the state's attorneys advising him of his rights. App. 6-7 He testified, however, that he did not recall giving any of the substantive content of the statement. *Id.*

Over the objections of defense counsel, the State was then permitted to go through the entire 29-page statement, asking for every question whether he had been asked that question and given that answer. To every such question, Mr. Wiseman gave an identical answer – "I don't recall." App. 7 In this manner, the State was allowed to put before the jury the entire content of the statement. *Id.* The statement asserted several facts which were extremely harmful to petitioner, including that:

- Wiseman belonged to the Black Disciples gang in 1995, he was told by fellow gang members that the KGBs shot Black Disciples gang member Eddie on June 18, 1995, and the next day he went to the park

with fellow gang members to look for the KGBs; App. 38-43

- later that day he went over to Mike's house, that Mike was a high-ranking member of the Black Disciples gang who ruled over an area of the City, and that he was shown a photograph of the person he knew as Mike which was marked as exhibit 4 to the statement;[1] App. 45-46
- Mike asked a fellow gang member, Jamal, whether he knew where the KGBs were and Jamal told him they were at the park, Jamal said he wanted to go to the park and get them and Mike said he would find a way, which Wiseman understood to mean that Jamal wanted to shoot at the KGBs; App. 46-47
- Mike said he would see how they were going to do it, and Jamal and Mike then drove around in a car looking for the KGBs and working out how to set up shooting at them; App. 47
- when they came back Mike said it was going to be as easy as taking candy from a baby, and Mike then asked where everybody was because somebody was supposed to go with him to do the shooting; App. 47-48
- gang members Mike, Jamal, Craig, Wiseman, Pretty Ricky and April got in two cars, both cars went to Marquette Park, and once at the park Mike told the gang members to go into the park and "take care of that" which Wiseman understood meant shoot the KGBs; App. 49-51
- Mike then told one of the gang members, Craig, to get the bag which contained the guns out of the car and Mike drove off with April; App. 50-51

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[1] In his trial testimony, Wiseman identified petitioner as Mike.

- Wiseman, Jamal and Craig then went into the park while Pretty Ricky stayed in the car, and once in the park Craig passed out the loaded guns, giving an Uzi to Jamal, a .38 revolver to Wiseman, and a .9 millimeter gun to himself; App. 51-53
- the three of them put on gloves, he observed the KGBs, Jamal shot many times at the KGBs, Wiseman shot 2-3 times, and Craig's gun jammed; App. 53-56
- the three of them went back to the car and drove back to Mike's house, where Jamal took the guns into Mike's house and Mike asked what happened; App. 56-57
- Craig told Mike his gun jammed, Wiseman told Mike he shot two or three times, and Mike said "I just better hear something in the newspaper or I'm going to see some ambulances," which meant that he wanted to know that "business was took care of"; App. 57
- later Wiseman talked to Mike on the phone and Mike told him that the police were looking for them and he should lay low, and Mike told him not to go "tricking off on me," and to tell the police that Mike had nothing to do with the shooting and was on the porch all the time; App. 58-59
- Wiseman made a drawing of the park, showing where Jamal, Wiseman and Craig were at the time of the shooting and also showing the location of the KGBs. App. 60

Based on the State's examination of Wiseman, petitioner moved for a mistrial on the basis, *inter alia*, that admission of the statement in this manner, with the witness saying that he could not recall anything, denied him his right to confront the witness. The motion was denied. The State was then allowed to again present the out-of-court statement of Wiseman, through testimony of

an assistant state's attorney who was present for the statement, and the statement itself, People's No. 25, was admitted into evidence and published to the jury. App. 7

Petitioner was convicted by the jury of first degree murder and sentenced to 50 years imprisonment. App. 2

On appeal, petitioner argued, *inter alia*, that his sixth amendment right of confrontation was violated when the trial court allowed the State to introduce Wiseman's out-of-court statement as substantive evidence. App. 13-14 The Appellate Court rejected the argument, ruling that admission of the statement did not deny petitioner his sixth amendment right to cross-examine the witness, even though Wiseman failed to recollect either the June 19, 1995 incident or the content of the statement he gave concerning that statement. App. 14-15 Petitioner then sought leave to appeal from the Illinois Supreme Court, again arguing that admission of Wiseman's statement violated the confrontation clause of the sixth amendment to the United States Constitution. On May 31, 2007, the Illinois Supreme Court denied leave to appeal. App. 34

ARGUMENT

1. Reasons for Granting the Writ

Petitioner was convicted, and essentially sentenced to life in prison, based upon an out-of-court statement made by a witness who refused to meaningfully participate in the trial proceedings: the witness claimed that he remembered neither the statement nor the underlying incident. This Court has issued several opinions in the last few years correcting lower courts' holdings as to the proper

scope of the sixth amendment, and setting forth the requirement that any testimonial statement introduced against a criminal defendant must be tested through cross-examination. This Court has never addressed, however, the type of situation presented here: the introduction into evidence of a damning out-of-court statement where the witness professes no current knowledge whatsoever of either the statement or the underlying incident.

Several courts have countenanced the introduction of such statements, even where the witness disavows any current knowledge of the incident or the statement, while other courts have stressed that the right to cross-examine is more than a procedural right, and has some substantive content which may lead to the exclusion of the statement. This Court should grant certiorari in this case to set forth clearly the standards that should be used to determine whether out-of-court testimonial statements may be introduced against a criminal defendant where any substantive cross-examination of the statement is prevented by the witness's claimed lack of recollection.

2. Petitioner's Sixth Amendment Right to Confront the Witnesses Against Him Was Violated by the Admission of a Witness's Out-of-Court Statement Which Was Not Subject to Cross-examination

Wiseman's testimony at trial did not inculpate petitioner at all – Wiseman claimed that he was unable to remember either the events of June 19, 1995 or the statement he gave to state's attorneys concerning the murder. What was devastating to petitioner, however, was the out-of-court statement which Wiseman gave to state's attorneys' investigators, a statement which petitioner was entirely unable to challenge because Wiseman claimed

that he could not recall making it. Given that every other major witness against petitioner was significantly impeached by contrary sworn statements, convictions and animus against petitioner because he had left the gang, this meant that petitioner was convicted based upon an out-of-court *ex parte* testimonial statement which he never had a fair opportunity to challenge – a violation of his sixth amendment right to confront the witnesses against him.

a. The Witness's Statement Was Testimonial.

Wiseman's statement was clearly testimonial. "Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not sworn testimony, but the absence of oath was not dispositive." *Crawford v. Washington*, 541 U.S. 36, 52 (2004). As this Court later reiterated:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 126 S. Ct. 2266, 2273-2274 (2006).

Here, Wiseman's statement was taken by state's attorney investigators and police several days after the

shooting, and the primary purpose was to establish his version of events for the purpose of a later criminal prosecution. It was therefore testimonial, and its admission at trial violated petitioner's sixth amendment rights unless there was adequate cross-examination. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford v. Washington*, 541 U.S. 36, 68-69.

b. Because the Witness Testified That He Could Recall Neither the Underlying Incident Nor the Statement, Petitioner Was Denied His Sixth Amendment Right to Cross-examine Him

This Court has never previously decided a case involving such an extensive and comprehensive lack of recall as that professed by the witness here. Not only did Wiseman claim that he had no recollection of the incident itself, he also claimed that he could recall nothing about the content of the statement. Thus, petitioner was confronted not with in-court testimony in any meaningful sense of the concept, but with an out-of-court statement where there could be no cross-examination about the contents of the assertions, the circumstances under which the assertions were made, the self-perceived mental or physical status of Wiseman when he made the statement, the motivations of Wiseman, his ability to perceive the facts he alleged in the statement, or any of the other myriad issues that a jury must usually consider when determining the reliability of a statement.

The closest case to this which this Court has decided is *United States v. Owens*, 484 U.S. 554 (1988). There, this

Court held that it was not a violation of the sixth amendment for the State to present evidence from a witness who had genuinely lost a portion of his memory, when the witness could recall generally the facts of the attack, could clearly recall that he had made a statement identifying the defendant to an investigator, but could not remember, at the time of trial, the defendant attacking him. This Court noted that:

> "[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987), quoting [*Delaware v.*] *Fensterer*, [474 U.S. 15] 20 (1985) (emphasis added); *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *Ohio v. Roberts*, 448 U.S. 56, 73, n. 12 (1980). As *Fensterer* demonstrates, that opportunity is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief.

United States v. Owens, 484 U.S. 554, 559 (1988). This Court further defined the circumstances under which a witness may ordinarily be regarded as subject to cross-examination as being "when he is placed on the stand, under oath, and responds willingly to questions," *United States v. Owens*, 484 U.S. at 561, but noted that "limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the Rule no longer exists." *Id.* at 561-62. While the Court did state that memory loss such as that experienced by the witness in Owens did not destroy the right of cross-examination, that

memory loss was significantly less severe than that asserted by Wiseman in this case.

First of all, the witness in Owens did recall some facts of the incident, and did recall that he had previously made a statement in which he had identified the defendant. Moreover, the only portion of his prior statement which was introduced at trial was the statement that he did recall – that it was the defendant who had attacked him. There was no attempt by the State to introduce any comprehensive *ex parte* description of the incident such as was done in this case with Wiseman. Additionally, there was no suggestion that the witness was intentionally avoiding cross-examination by feigned memory loss, such as appeared to be the case with Wiseman. And there was a real opportunity to cross-examine the witness as to what he did recall, pointing out that while he had made certain statements he could no longer recall the reason why he had made them, and that he did recall aspects of the attack but could no longer recall how it was that he was able to identify the defendant.

The contrast with the situation here could not be starker. By every indication, Wiseman was not being forthright when he denied any recollection of the incident or the statement, and his stock answer "I don't recall," made it impossible to test his ability to perceive, whether he was relating things he had learned directly or from others, his possible animus against petitioner and the general reliability of the *ex parte* statement to the state's attorneys and police. Certainly, he did not fit *Owen's* definition of a witness who "responds willingly to questions."

Moreover, this Court has not ruled that the fact that a witness is on the stand is, in and of itself, the sole requirement in order to find that a witness is subject to cross-examination. This court in *Owens* specifically noted that the confrontation clause could be violated by either the trial court limiting the cross-examination, or by the witness's assertion of privilege. *Owens* at 561-62. Yet there is no principled difference between a limitation on cross-examination caused by a trial judge or by a witness asserting a privilege, and that caused by a witness refusing to testify forthrightly or by genuinely lacking all recollection of the incident or a prior statement. In all of these cases the criminal defendant is denied the real opportunity to challenge the witness, and if a prior *ex parte* statement of the witness is introduced into evidence, is denied the real opportunity to challenge that statement. In all of these cases, the evil which the sixth amendment sought to eradicate – trial by ex parte and un-cross-examined affidavit – affects the defendant in an identical way: the allegations against him cannot be tested in the crucible of cross-examination.

While the facts in *Owens* and this case are thus significantly different, there is no question that some of the language in *Owens* would deny petitioner relief in this case. This language, however, was unnecessary to the decision in *Owens*, and should be reconsidered by this Court in determining this present case. In cases predating *Owens*, which this Court has not overruled, this Court repeatedly stressed that the right of cross-examination involved much more than the right to put a witness on the witness stand and have him sit there while he was questioned. Thus, in *California v. Green*, 399 U.S. 149 (1970), this Court held that the sixth amendment does not bar

introduction of out-of-court statements "where the declarant is testifying as a witness and [is] subject to *full and effective cross-examination*," 399 U.S. at 158 (emphasis added), and that the amendment guarantees criminal defendants the right to engage in cross-examination sufficient to "affor[d] the trier of fact a satisfactory basis for evaluating the truth of [a] prior statement." *Id.* at 161. And in *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985), this Court held that the right of confrontation ensures "an opportunity for effective cross-examination." *See also*, *Nelson v. O'Neil*, 402 U.S. 622, 629 (1971) (Confrontation Clause does not bar admission of out-of-court statement where defendant has "the benefit of *full and effective* cross-examination of [declarant]") (emphasis added); *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972) (purpose of Confrontation Clause is to provide satisfactory basis for evaluation of truth of prior statement); *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (plurality) ("mission of Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process"); *Douglas v. Alabama*, 380 U.S. 415, 419-20 (1965) (cross-examination necessary to "test the truth" of the out-of-court statement).

California v. Green, 399 U.S. 149 (1970), specifically reserved the question presented in this case. There, the Court held that it did not violate the confrontation clause for the State to admit prior testimony of a witness who was "'markedly evasive and uncooperative on the stand,' *People v. Green*, 70 Cal. 2d 654, 657, 451 P. 2d 422, 423 (1969)," *California v. Green*, at 151-52, since there had been "full and effective cross-examination" at the prior proceeding. But the Court specifically noted that "[w]hether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the

application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture." *California v. Green*, at 168-69. In a footnote appended to this quotation, the Court noted:

> Even among proponents of the view that prior statements should be admissible as substantive evidence, disagreement appears to exist as to whether to apply this rule to the case of a witness who disclaims all present knowledge of the ultimate event. Commentators have noted that in such a case the opportunities for testing the prior statement through cross-examination at trial may be significantly diminished. See *Falknor*, The Hearsay Rule and Its Exceptions, 2 U. C. L. A. L. Rev. 43, 53 (1954); 31 N. Y. U. L. Rev. 1101, 1105 (1956).

California v. Green, at 170.

Some lower courts have also recognized the significant confrontation clause issues raised by witnesses who are unable to remember events at trial, and whose prior, uncross-examined statements, are then introduced against the defendant. Thus, in *United States v. Di Caro*, 772 F.2d 1314 (7th Cir. 1985), the court stated:

> In light of the significance attached to the cross-examination requirement, we must be careful to avoid a construction that would render the requirement effectively meaningless. We thus recognize, as have those commentators who have considered the particular question, that in many or perhaps most cases in which the witness suffers a total memory lapse concerning both the prior statement and its contents, the witness cannot be considered subject to cross-examination concerning the statement under the

> Rule. *See* 4 Weinstein's Evidence para. 801(d)(1)(A) [07], at 801-132 (1984); 4 D. Louisell & C. Mueller, Federal Evidence § 419, at 180-81. As one treatise has persuasively argued, "Rule 801(d)(1)(A)'s cross-examination requirement should not be viewed as an empty formalism which can be satisfied by the mere fact that the witness is present and can be required to sit still long enough for questions to be put." 4 D. Louisell & C. Mueller, Federal Evidence § 419, at 181.

United States v. Di Caro, 772 F.2d at 1323. Although the court in *Di Caro* did approve of the admission of the witness's prior statement in that case, this was because of the "unique circumstances," *id.* at 1323, in which the witness did testify about some events and "defense counsel was able to impeach Brown's credibility severely with numerous statements that he had made in prior federal and state court hearings." *Id.* at 1325.

In *United States v. Torrez-Ortega*, 184 F.3d 1128 (10th Cir. 1999), a case remarkably similar to this one, the Tenth Circuit refused to countenance the type of tactic used by the State here and reversed the conviction. The witness, Valdez, who had previously been granted immunity in the case, improperly asserted a fifth amendment right not to testify about the substantive facts in the case, although he did answer some questions. *United States v. Torrez-Ortega*, 184 F.3d at 1133. The prosecutor then:

> ostensibly examining Valdez, would read excerpts from the grand jury testimony and ask Valdez if he had made the statements attributed to him. Valdez would then refuse to answer, asserting a claim against self-incrimination. This pattern continued until large segments of Valdez's grand jury testimony had been read into

> evidence. With a few minor exceptions, Valdez refused to answer questions posed by the defense on cross-examination.

United States v. Torrez-Ortega, 184 F.3d at 1131-1132. The court held that this violated the defendant's sixth amendment right to confront the witness, because even though "Valdez took the stand and the oath . . . he assuredly did not respond willingly to questions – precisely because of his obstinate and repeated assertion of the privilege against self-incrimination." *Id.* at 1132. While the asserted reason of the witness in *Torrez-Ortega* not to engage in cross-examination was different from here – there it was an improper assertion of a privilege, in this case it was an apparently improper assertion of memory loss – the essential principle remains: the mere fact that a witness is on the stand is insufficient to constitute confrontation pursuant to the sixth amendment when the witness fails to engage in any meaningful exchange concerning the events or his prior statement.

In *United States v. Vargas*, 933 F.2d 701 (9th Cir. 1991), the court reversed a conviction on confrontation clause grounds, even though the witness appeared before the jury and testified, where the court's procedure limited the defendants' opportunity to cross-examine the witness. In that case, the court, concerned that the witness might improperly claim before the jury a fifth amendment right not to testify, had the attorneys examine him outside the presence of the jury, and then had that script read in front of the jury, with the witness, by order of the court, repeating his prior answers. The court held that this was a sixth amendment violation, since even though the witness was present before the jury, the fact that he could not be adequately questioned about the prior statements violated

the defendant's rights, since the confrontation clause requires that "an available declarant be subject to cross-examination about the prior testimony." *United States v. Vargas*, at 706.

United States v. Spotted War Bonnet, 933 F.2d 1471, 1474 (8th Cir. 1991), also held that the sixth amendment is not satisfied by the mere presence of the witness on the witness stand. There, the court recognized that:

> simply putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns. If, for example, a child is so young that she cannot be cross-examined at all, or if she is "simply too young and too frightened to be subjected to a thorough direct or cross-examination[,]" *United States v. Dorian,* supra, 803 F.2d at 1446, the fact that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the Clause.

United States v. Spotted War Bonnet, 933 F.2d at 1474. And in *Barksdale v. State*, 265 Ga. 9, 13 (Ga. 1995), where a witness was present in court but refused to testify, even though he had no legitimate excuse for the refusal, the Supreme Court of Georgia held that this refusal rendered him unavailable for cross-examination, and it therefore violated the defendant's sixth amendment confrontation clause right of cross-examination to introduce a prior videotaped statement by the witness. *See also People v. Yarbrough*, 166 Ill. App. 3d 825 (5th Dist. 1988) (conviction reversed where the court admitted an out-of-court statement of a witness who could not remember the incident or statement at trial, on the basis that "a defendant cannot cross-examine a witness with respect to the truth or falsity

of an out-of-court statement of which the witness has no memory." 166 Ill. App. 3d at 831).

While many courts have recognized that introduction of an out-of-court statement, not subject to cross-examination, implicates confrontation clause issues where the witness disclaims knowledge of the incident and/or statement at trial, other courts have routinely admitted such statements. *See, e.g., United States v. Knox*, 124 F.3d 1360, 1364 (10th Cir. 1997) (not discussing confrontation clause concerns, but holding that where witness's claimed loss of memory appeared false, the prior statements were admissible under Fed. R. Evid. 801(d)(1)(A)); *United States v. Bigham*, 812 F.2d 943, 946-47 (5th Cir. 1987) (not discussing confrontation clause concerns, but holding that where witness's "selective memory loss was more convenient than actual," the prior statements were admissible under Fed. R. Evid. 801(d)(1)(A)); *United States v. Di Caro*, 772 F.2d at 1321-22 (where witness's lack of memory is feigned, prior statements were admissible under 801(d)(1)(A), although the court recognized that confrontation clause concerns were satisfied only because of the unique circumstances of the case); *United States v. Thompson*, 708 F.2d 1294, 1302 (8th Cir. 1983) (where witness is "recalcitrant" and gives "evasive answers," court may admit prior statements as inconsistent under 801(d)(1)(A)); *People v. Wheatley*, 187 Ill. App. 3d 371, 381 (1st Dist. 1989) (admission of testimony from a prior trial involving a different defendant did not violate the defendant's rights under the confrontation clause, even though the witness claimed on cross-examination at defendant's trial he could not remember anything).

Similarly, some commentators have approved of the admission of un-cross-examined out-of-court statements,

even where the witness claims loss of memory, without considering the confrontation clause rights of the defendant. *See,* 3A John H. Wigmore, Evidence § 1043, at 1061 (James H. Chadbourn rev. ed. 1970) ("the unwilling witness often takes refuge in a failure to remember, and the astute liar is sometimes impregnable unless his flank can be exposed to an attack of this sort"); Michael H. Graham, Federal Practice & Procedure § 6582, at 183 n.9 (int. ed. 1992) (courts typically allow for admission under Rule 801(d)(1)(A) where witness's current lack of recollection is deemed contrivance).

These cases and commentators fail to recognize the fundamental importance of rigorous testing of evidence introduced against a defendant, and the critical role which adequate cross-examination plays in this process. This Court has consistently described cross-examination as a "bedrock procedural guarantee." *Crawford*, 541 U.S. at 42, citing *Pointer v. Texas*, 380 U.S. 400, 406 (1965). "The right to confront one's accusers is a concept that dates back to Roman times," *Crawford* at 43, which subsequently became firmly established in the common law. *Id.* at 46. One purpose of the confrontation clause is to provide a satisfactory basis for the evaluation of the truth of prior statements, *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972); its mission is to advance the truth-determining process. *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Douglas v. Alabama*, 380 U.S. 415 (1965). When an *ex parte* pre-trial statement is introduced against a defendant at trial, but the witness refuses to engage in any meaningful testimony or explanation of the statement, the purpose and ability of cross-examination – to separate out the truth from the lies, the reliable assertions from the unreliable – is lost. The defendant is essentially in the same situation as

existed at the time of the trial of Sir Walter Raleigh – his guilt is determined based on statements elicited by the prosecuting authorities, outside his presence, with the jury being denied the opportunity to hear possible contradictions in the story.

While the witness who feigns loss of memory is undoubtedly engaging in misconduct, there is no necessary indication that this misconduct should be attributed to the defendant. A devious witness, anxious to avoid a rigorous examination which would expose the falsity of his prior accusations, can take refuge in an asserted loss of memory, knowing that the prior statement would then be admitted. And while there are no indications that this is the case here, a sly prosecutor could likewise avoid harsh examination of a shaky prosecution witness by encouraging the witness to "disremember" the facts of his prior statement, or the giving of the statement itself, knowing that this will ensure the statement's admission in pristine form.

Moreover, the courts are not powerless to pressure a forgetful witness to testify when the witness's loss of memory appears incredible. Such asserted loss of memory is not significantly different from an improper assertion of a privilege not to testify, an assertion which the courts routinely deal with by the threat of a contempt citation and the imposition of sanctions. There is no indication that in this case such a threat would not have been effective to pry testimony from Wiseman. According to Wiseman, by the time of his testimony he had relatively little time left to serve on his murder sentence, and he would surely have been anxious to avoid an addition to that sentence which would have resulted if the court had imposed sanctions on him for his apparently wilful memory loss. While inquiry into the good faith of a witness's assertion of memory loss

would undoubtedly complicate the trial to some degree, knowledge that such inquiry would result if the witness claimed he could recall nothing would surely minimize the number of such claims, and vastly increase the likelihood that the reliability of an ostensibly damning pre-trial statement could be adequately tested.

Petitioner is not suggesting that the only cross-examination which would satisfy the sixth amendment is that which "is effective in whatever way and to whatever extent the defense might wish." *Owens*, 484 U.S. 554, 559, *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987), quoting *Delaware v. Fensterer*, 474 U.S. 15 (1985). Rather, the test should be that advocated by Justice Brennan in his dissent in *United States v. Owens*, 484 U.S. 554: "the Sixth Amendment guarantees criminal defendants the right to engage in cross-examination sufficient to 'affor[d] the trier of fact a satisfactory basis for evaluating the truth of [a] prior statement,' *California v. Green*, 399 U.S. 149, 161 (1970)." *Id.* at 565. As Justice Brennan explained:

> [C]onsistent with the Confrontation Clause's mission of 'advanc[ing] a practical concern for the accuracy of the truth-determining process in criminal trials,' *Dutton v. Evans*, 400 U.S. 74, 89 (1970), we have suggested that the touchstone of effectiveness is whether the cross-examination affords "'the trier of fact . . . a satisfactory basis for evaluating the truth of the prior statement.'" *Ibid.* (quoting *California v. Green*, supra, at 161). See also *Ohio v. Roberts*, 448 U.S. 56, 73 (1980) (introduction of prior testimony where the declarant was unavailable at trial did not violate Confrontation Clause where previous cross-examination of declarant "afforded the trier of fact a satisfactory basis for evaluating the

> truth of the prior statement" (citation omitted; internal quotation marks omitted)); *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972) (same).

United States v. Owens, 484 U.S. at 568-569 (footnote omitted) (Justice Brennan, dissenting).

Such a test would allow introduction of arguably relevant evidence in all but the most rare circumstances, since it would be highly unusual for a witness to genuinely assert a memory loss which prevented a jury from adequately evaluating the truth of a prior statement, while a feigned memory loss could almost always be overcome by the threat of sanctions. In those few cases where the test did not permit the introduction of evidence, the exclusion of the evidence would be in accordance with the constitutional mandates which protect a defendant's right to a fair trial and the right to challenge the evidence introduced against him. This court has recently endorsed such exclusion, of even highly relevant evidence in *Davis v. Washington*, 126 S. Ct. 2266 (2006), where the Court noted that "[w]e may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. Cf. *Kyllo v. United States*, 533 U.S. 27 (2001) (suppressing evidence from an illegal search)." *Davis*, 126 S. Ct. at 2280. Additionally, as the Court held in *Davis*, if it appears that the witness's failure to participate in cross-examination has been improperly procured by a defendant, that defendant may be held to have forfeited his right to confront the witness:

> [W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in

> proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." 541 U.S., at 62 (citing *Reynolds*, 98 U.S., at 158-159). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

Davis v. Washington, 126 S. Ct. at 2280.

It is therefore clear that the problem of a witness who asserts that he cannot remember facts concerning an incident about which he previously gave a statement may be resolved in a manner which is consistent with the commands of the confrontation clause of the sixth amendment, is in accordance with the values of subjecting inculpatory testimony to testing though cross-examination, and which satisfies society's goal of bringing guilty persons to justice. Where a witness professes either complete or partial inability to recall, and the State wishes to introduce a testimonial statement which has not been subjected to cross-examination, the court must determine whether that inability prevents the trier of fact from having a satisfactory basis for evaluating the reliability of the testimonial statement, as well as whether the asserted inability to recall is genuine. Only in the event that the witness persists in his asserted memory loss, and the court determines that the extent of memory loss deprives the trier of fact of a satisfactory basis for evaluating the prior statement, will the pre-trial statement be barred from evidence. While in highly unusual cases this will result in arguably relevant evidence being withheld from the trier of fact, this will be evidence which has not been subjected

to adequate testing by cross-examination, and therefore should properly be excluded from the trial. This is no greater protection for the defendant, and no greater imposition on the State in attempting to prove guilt, than is imposed in myriad other situations. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428 (2000) (suppression of statement after failure to give *Miranda* warnings); *Arizona v. Roberson*, 486 U.S. 675 (1988) (*id.*); *Arizona v. Hicks*, 480 U.S. 321 (1987) (suppression of evidence after unreasonable search); *Hayes v. Florida*, 470 U.S. 811 (1985) (suppression of evidence after unreasonable seizure).

CONCLUSION

This court should grant certiorari in this case in order to set forth the circumstances under which a testimonial out-of-court statement may be introduced at trial against a criminal defendant, where the witness who made the statement professes complete lack of current knowledge of both the statement and the incident recounted in the statement, and should reverse the petitioner's conviction.

Dated: August 21, 2007

Respectfully submitted,

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Third Division
January 21, 2004

No. 1-02-1964

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MICHAEL THOMPSON, Defendant-Appellant.	)))))))	Appeal from the Circuit Court of Cook County No. 95 CR 17061 Honorable Joseph G. Kazmierski, Judge Presiding.

ORDER

This case comes to us after a second jury trial. Following his first jury trial, defendant Michael Thompson, was found guilty of first-degree murder under an accountability and transferred intent theory. Defendant's motion and amended motion for a new trial were both denied and he was subsequently sentenced to 75 years' imprisonment. Defendant filed a motion to reconsider sentence and was resentenced to 60 years' imprisonment. On November 11, 1997, defendant filed a timely notice of appeal.

On appeal, we reversed defendant's conviction and sentence and remanded for a new trial after we concluded that the prosecutor's closing argument implied that defendant and defense counsel had conspired to obtain witness recantations thereby denying defendant a fair

trial. *People v. Thompson,* 313 Ill. App. 3d 510, 514-16, 730 N.E.2d 118 (2000). On remand, a second jury found defendant guilty of first-degree murder and he was subsequently sentenced to 50 years' imprisonment. Defendant now appeals.

On appeal, defendant contends that: (1) the trial court erred in allowing State witness Eugene Wiseman's court-reported statement to be admitted as substantive evidence under section 115-10.1 of the Code of Criminal Procedure (Code) (725 ILCS 5/115-10.1 (West 1998)); (2) the recantation statements of State witnesses April Alston, Eddie Frazier, and Derrick Johnson should have been admitted as substantive evidence under section 115-10.1 of the Code, rather than merely for the limited purpose of impeachment evidence; (3) the trial court erred by denying his motion to suppress alleged inculpatory statements he made to Assistant State's Attorney Sybil Thomas; (4) the trial court committed reversible error in admitting his 17-year-old burglary conviction for impeachment purposes; (5) the trial court erred in refusing to issue his tendered instruction on the lesser offense of involuntary manslaughter; (6) the prosecutor shifted the burden of proof during closing argument when he commented on defendant's failure to call three alibi witnesses; and (7) the State failed to prove him guilty beyond a reasonable doubt. For the reasons that follow, we affirm.

FACTUAL BACKGROUND

The facts in this case are adequately set forth in the opinion on defendant's original appeal and will therefore only be repeated here as necessary. On June 19, 1995, A.Z. died of a gunshot wound she sustained after she was

caught in gang gunfire in Marquette Park. The shooting stemmed from gang rivalry between members of the Black Disciples (BDs) and the Krazy Get Down Boys (KGBs). The night prior to the shooting incident, Eddie Frazier and Derrick Johnson were in Marquette Park with two female acquaintances when they were approached by a group of KGBs. At the time, Frazier and Johnson were both members of the BDs. Frazier and Johnson were attacked and chased out of the park by members of the KGBs.

According to evidence presented at trial, when defendant learned of the attack, he organized a retaliatory attack against the KGBs that was to take place in the park, that next night. At the time, defendant was a ranking member of the BDs, holding the rank of co-minister.

At trial, State's witness, April Alston, testified that at the time of the shooting incident, she held the rank of First Lady of the BDs. She testified that on June 19, 1995, on the evening of the shooting, she went over to defendant's house where she met defendant, Eugene Wiseman, Craig Newton, Jamal Harmon, and various other BDs. Everyone was on the front porch of defendant's house. At some point, the defendant, Wiseman, Newton, and Harmon left the porch together and went upstairs in defendant's house. About ten minutes later, they all came back downstairs. Harmon was carrying a black gym bag, which he put in the trunk of Newton's car. Alston testified that she was unaware of the bag's contents.

Defendant then told Alston to get into Newton's car with Newton, while he, Wiseman, and an individual called "Pretty Ricky" all got into Harmon's car with Harmon. Both cars then drove to 70th and Fairfield and parked less than a block from Marquette Park. Alston then got into

Harmon's car with defendant, while Harmon, Wiseman, Newton and "Pretty Ricky" remained behind with Newton's car. Alston testified that while defendant was driving her back to his house in Harmon's car, he told her that the fellow gang members they had left behind "were going to take care of some business or something in the park," and that she should not "mention it."

Alston testified that the individuals left behind at the park returned to defendant's house less than ten minutes later, returning in Newton's car. Harmon took the black gym bag out the trunk of Newton's car, took it upstairs in defendant's house, and came back downstairs without the bag. Alston testified that about a week later, she learned that a woman had been shot and killed in Marquette Park on June 19, 1995.

State's witness, Eddie Frazier, testified that at the time of the shooting incident he was a member of the BDs. He testified that the night prior to the shooting, he and a fellow gang member named Derrick Johnson were in Marquette Park along with two female friends, when they were assaulted and chased out of the park by members of the KGBs. Frazier testified that he was pistol whipped and that numerous bullets were fired at him and his companions. Frazier stated that everyone eventually escaped in his car.

The next evening at approximately 8 p.m., on the date of the shooting, Frazier and Johnson went to defendant's house where they met other BD gang members on the front porch of defendant's house. Frazier testified that he heard defendant tell Wiseman that they needed "to go take care of some business." Frazier then went upstairs to defendant's second floor apartment to use the telephone to

return a page he received from his father. After speaking with his father on the telephone, Frazier left defendant's apartment, returning about forty-five minutes later. Upon his return, Frazier spoke with Wiseman and noticed that he was carrying a .38 caliber pistol. Frazier testified that Johnson told him that they had taken care of the "business." Frazier further testified that a few months prior to the shooting incident, he had seen an Uzi pistol in a black gym bag in defendant's bedroom.

State's witness, Derrick Johnson, testified that at the time of A.Z.'s shooting, he was a member of the BDs. Johnson acknowledged that he was with Frazier on the evening of June 18, 1995, when they were both attacked and chased out of Marquette Park by a group of KGBs. Johnson testified that on the evening of the shooting, he was on the front porch of defendant's house with some other BDs including Alston, Fraizer, Harmon, Newton, "Pretty Ricky," and Wiseman, when he overheard defendant tell Harmon and Wiseman how to carry out the ambush on the KGBs. According to Johnson, defendant told Harmon and Wiseman to park their cars on 70th and California, walk through the park, and that they should be able to see the KGBs "right there." Defendant then stated that Harmon and Wiseman should "spray the motherf-----s." Johnson testified that the term "spray" meant to shoot.

Johnson testified that after defendant spoke with Harmon and Wiseman, defendant, Harmon, and Newton, went upstairs in defendant's house staying there for approximately 10 minutes. When they emerged from the house, Harmon was carrying an Uzi pistol and defendant was carrying a black gym bag. Johnson stated that about a year prior to the shooting incident he had seen the Uzi and black gym bag in defendant's bedroom. Johnson testified

that after Harmon and defendant emerged from the house with the Uzi and black gym bag, they got into Harmon's car with Wiseman and "Pretty Ricky." Alston got into Newton's car with Newton. Both vehicles left the house at the same time.

Johnson testified that about ten minutes later, defendant and Alston returned to the house in Harmon's car. Shortly thereafter, the other gang members returned in Newton's car. When Harmon exited the vehicle, he was carrying a black gym bag which he took inside defendant's house. Johnson testified that later that evening, defendant told him to inform Frazier that they had taken care of everything.

State's witness, Eugene Wiseman, who was being held in custody at the Illinois Department of Corrections, admitted that he pleaded guilty to killing A.Z. He testified, however, that he could not recall if he was in a gang at the time of the shooting and did not recall where he was on the date A.Z. was shot and killed. Defense counsel then requested a sidebar, and in chambers argued against the possible admission of Wiseman's court-reported confession statement as substantive evidence under section 115-10.1 of the Code of Criminal Procedure (Code) (725 ILCS 5/115-10.1 (West 1998)). After hearing brief arguments on the matter, the trial court disagreed with defense counsel's position. When Wiseman's direct examination resumed, the State presented him with a copy of the court-reported confession statement he had given to Assistant State's Attorneys Jim Piper and Domenica Stephenson on June 27, 1995, eight days after A.Z. was killed.

Wiseman denied recollection of the statement, but testified that he recognized the statement, he remembered

the ASA reading the statement back to him out-loud, and he recalled signing each page of the statement. When Wiseman began denying recollection of some of the responses he had given in his confession statement, defense counsel requested a sidebar in chambers which was granted.

In chambers, defense counsel argued that Wiseman was exposing himself to self-incrimination on perjury charges and should therefore be advised of an opportunity to consult with his own counsel before proceeding. The State responded that perjury was not a basis for a fifth amendment claim, that it had informed Wiseman's attorney that Wiseman would be called as a State witness, and that defense counsel had no standing to assert Wiseman's rights. The trial court agreed with the State, and Wiseman's direct examination resumed. The State then continued reviewing each question in the statement with Wiseman and he continued to deny recollection of each of the responses he had given in the statement.

State's witness, ASA Domenica Stephenson testified that she was at Area one police headquarters on June 27. 1995, when Wiseman gave his court-reported confession statement in her presence and in the presence of ASA Jim Piper and a detective. ASA Stephenson testified that after Wiseman gave his statement, he and ASA Piper reviewed the statement together and afterwards Wiseman made several corrections to the statement which were initialed by all of the individuals in the interview room, except for the court reporter. ASA Stephenson claimed that Wiseman subsequently signed each page of his corrected statement. After hearing ASA Stephenson's testimony, the trial court allowed her to publish Wiseman's statement to the jury.

State's witness, ASA Sybil Thomas testified that on the morning of June 27, 1995, she interviewed defendant regarding A.Z.'s shooting. ASA Thomas testified that after she advised defendant of his *Miranda* rights and he requested an attorney, she stopped the interview and left the room. About 1½ hour later, as defendant was being escorted from the washroom, he shouted to ASA Thomas that he wanted to talk with her. ASA Thomas then asked defendant if he wanted to waive his right to an attorney, to which defendant replied "yes." Defendant stated that he wanted to cut a deal, stating that he would tell where the guns were if he could cut a deal. After ASA Thomas responded that she did not have the power to cut a deal with defendant, defendant continued talking, stating that as he was driving a couple of the "defendants" to the park, he had "tried to talk them out of it." Defendant again asked if he could cut a deal, to which ASA Thomas again replied that she did not have the power to cut a deal with defendant. Defendant eventually asked for an attorney, whereupon ASA Thomas terminated the conversation.

Detective John Bloore testified that after Newton was arrested and interviewed, he led police to a garage located at 6924 South Laflin where an Uzi pistol was recovered from a white canvas bag. Firearms expert Aaron Horn opined that the bullet which killed A.Z. was fired from the same Uzi pistol that police recovered from the white canvas bag.

Defendant testified on his own behalf. He acknowledged that he had been a member of the BDs for five years and that he had been a co-minister in the gang, but testified that he left the gang in the summer of 1994 because he was upset that another division of the gang had murdered an eleven-year-old boy. Defendant's

testimony concerning his leaving the BDs in 1994 was impeached by a transcript from a preliminary hearing which showed that defendant had previously testified that he left the gang in 1993. Defendant's testimony on this matter was also impeached by the testimony of Detective John Griffin who testified that he was informed by defendant that defendant had left the BDs after the gang refused to pay his bond on a previous arrest.

Defendant testified that during his affiliation with the BDs, he was a part of the gang's drug-selling operations, which involved no violence. He further testified that his rank in the gang as co-minister did not give him the authority to direct other gang members.

Defendant testified that on the evening A.Z. was shot, he was working as a volunteer at the Inner City Youth Foundation (Foundation) located at 4500 South Michigan Avenue. Defendant testified that at the approximate time the shooting occurred, he was chauffeuring three high school students from the Foundation to their respective homes on the south side of Chicago. Defendant denied planning any gang-related attack in Marquette Park, denied ever speaking with ASA Thomas, and denied threatening April Alston, Eddie Frazier, or Derrick Johnson into going to his lawyer's office to give their recantation statements.

On cross-examination, defendant testified that he was aware that Frazier and Johnson were both BDs, but denied knowing them personally. He was unable to explain why telephone calls had been made from his house to Frazier and Johnson's respective homes. Defendant testified that he did not remember the names of the three

high school students from the Foundation he chauffeured home, because it happened "so long ago."

Defendant called his fiancee, Paschell Bennett, as a witness. Bennett was a 16 year employee of the Chicago Public Schools. She testified that in the summer of 1995, defendant's nephew, Amad Jackson, lived with her, defendant and their young son at 6355 South Campbell. She testified that Jackson was a friend of Eddie Frazier and Derrick Johnson, and that it was Jackson who placed telephone calls from her home to the respective homes of Frazier and Johnson. Bennett also testified that defendant left the BDs in the summer of 1994, after members of the gang killed a young boy. According to Bennett, defendant left the gang and went to Michigan to attend truck driving school, but returned to Chicago after he was informed that Bennett had received threatening telephone calls from gang members. Bennett testified that shortly after defendant returned to Chicago he was physically beaten. She testified that defendant then began working for Western Piece Dyers and after work would volunteer at the Foundation.

Bennett testified that on the date of the shooting, she arrived home from work at approximately 5:30 p.m., and that defendant was not at home. Bennett claimed that defendant arrived home between 10 p.m. and 10:30 p.m. At trial, telephone records showed that a telephone call was made from Bennett's home to defendant's cellular number at 5:49 p.m. Bennett testified that she made this call. Telephone records also revealed that three telephone calls were made from defendant and Bennett's home to Jamal Harmon's home phone at 5:49 p.m., 7:24 p.m., and 9:06 p.m. Bennett testified that she made all of these calls in an effort to return Harmon's page and finally succeeded

in reaching him at 9:06 p.m. Telephone records further revealed that a telephone call was made from defendant and Bennett's home to Eddie Frazier's home at 9:05 p.m. Bennett testified that she did not make this phone call, but claimed that she allowed Frazier to use her phone to return his father's page.

Bennett testified that on the night of the shooting, at approximately 9 p.m., she and her young son were sitting alone on the front porch of the home she shared with defendant. She claimed that during the entire evening, there was never a group of people sitting on her front porch.

Bennett acknowledged driving April Alston, Eddie Frazier, and Derrick Johnson to defendant's lawyer's office to give their recantation statements, but denied that she ever threatened them into going to the office. She also denied ever overhearing defendant threaten Alston, Frazier, or Johnson into going to the lawyer's office. Bennett testified that Alston, Frazier, and Johnson all contacted her about giving their recantations and asked her for car rides to the lawyer's office.

Bennett testified that she did not tell police or prosecution investigators about her version of the events or defendant's whereabouts on the evening of the shooting, because she did not believe it would make any difference and she was concerned about how her statement might be recorded.

Defendant's final witness was Morris Perkins from the Foundation. Perkins testified that on the date of the shooting, defendant arrived at the Foundation between 4:30 p.m. and 5 p.m., and left between 9:30 p.m. and 10 p.m. On cross-examination, Perkins conceded that when

he was approached by defendant's father a couple of months prior to trial, it had been about seven years since he had been asked to remember anything related to June 19, 1995, the date of the shooting. Perkins testified that the only thing that made June 19, 1995 stand-out in his mind was the fact that this date fell in the two-week period in which the Foundation organized a large community rally. Perkins stated that during this time period, volunteers such as defendant usually worked late hours at the Foundation to prepare for the rally. Perkins acknowledged that in the two weeks leading up to the rally he could not recall the exact time every volunteer left for the day.

The jury found defendant guilty of first-degree murder in the killing of A.Z. Thereafter, the trial court sentenced defendant to 50 years in the Illinois Department of Corrections. Defendant timely appealed.

ANALYSIS

I. Section 115-10.1

Defendant first contends that the trial court erred in allowing Wiseman's confession statement to be admitted as substantive evidence under section 115-10.1 of the Code. We disagree with defendant's contention.

Section 115-10.1 of the Code allows a witness' written or signed prior inconsistent statement, not made under oath, to be admitted as substantive evidence where the statement narrates, describes, or explains an event or condition of which the witness had personal knowledge, and the witness is subject to cross-examination concerning

the statement at the current proceeding. 725 ILCS 5/115-10.1(a), (b), (c)(2)(A) (West 1998).[1] In enacting section 115-10.1, the legislature determined that a testifying witness' prior inconsistent signed statement should be admitted as substantive evidence since: (1) the prior statement is usually made closer in time to the event in question than the witness' trial testimony; (2) parties need protection from turncoat witnesses; (3) the witness is available for cross-examination thereby eliminating hearsay concerns of unavailability; and (4) the admission of such statements furthers the search for truth in criminal proceedings. *People v. Morales,* 281 Ill. App. 3d 695, 702, 666 N.E.2d 839 (1996).

In this case, defendant maintains that his sixth amendment right of confrontation (U.S. Const., amend. VI) was violated when the trial court admitted Wiseman's statement as substantive evidence pursuant to section 115-10.1, because Wiseman was not subject to cross-examination regarding the statement where he testified

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[1] Section 115-10.1 of the Code provides in relevant part:

"In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and

(b) the witness is subject to cross-examination concerning the statement, and

(c) the statement –

* * *

(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and (A) the statement is proved to have been written or signed by the witness" 725 ILCS 5/115-10.1(a), (b), (c)(2)(A) (West 1998).

that he could not recall making the statement. Defendant is incorrect.

Under the confrontation clause of the sixth amendment, a criminal defendant has a constitutional right to cross-examine a witness in order to show motive, bias, or other factors which might influence the witness' testimony. *People v. Davis,* 337 Ill. App. 3d 977, 984, 787 N.E.2d 212 (2003). However, the confrontation clause guarantees a criminal defendant only "'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *People v. Flores,* 128 Ill. 2d 66, 89, 538 N.E.2d 481 (1989), citing *United States v. Owens*, 484 U.S. 554, 559, 98 L. Ed. 2d 951, 957, 108 S. Ct. 838, 842 (1988).

In *Owens,* the United States Supreme Court determined that a witness is generally subject to cross-examination concerning a prior identification under Rule 801(d)(1)(C) of the Federal Rules of Evidence (Fed. R. Evid. 801(d)(1)(C)), when the witness "is placed on the stand, under oath, and responds willingly to questions." *Owens,* 484 U.S. at 561, 98 L. Ed. 2d at 959, 108 S. Ct. 844. In this regard, the Court observed that:

> "limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the Rule no longer exists. But that effect is not produced by the witness' assertion of memory loss – which, as discussed earlier, is often the very result sought to be produced by the cross-examination, and can be effective in destroying the force of the prior statement." *Owens,*

484 U.S. at 561-62, 98 L. Ed. 2d at 959, 108 S. Ct. at 844.

Based on the rationale set forth in *Owens*, our supreme court has held that a "gap in the witness' recollection concerning the content of a prior statement does not necessarily preclude an opportunity for effective cross-examination." *Flores,* 128 Ill. 2d at 88. Consequently, our courts have determined that a defendant's sixth amendment right to confrontation is not violated by the admission of a witness' prior inconsistent statement under section 115-10.1, where the witness professes a memory loss regarding the content of the statement. *Flores,* 128 Ill. 2d at 88-90; *People v. Wheatley,* 187 Ill. App. 3d 371, 379-81, 543 N.E.2d 259 (1989).

II. Substantive Evidence and Section 115-10.1 of the Code

Defendant next contends that the recantation statements of State witnesses April Alston, Eddie Frazier, and Derrick Johnson all should have been admitted as substantive evidence under section 115-10.1 of the Code, rather than merely for the limited purpose of impeachment evidence. We must disagree with defendant.

It is within the sound discretion of the trial court to determine whether testimony is admissible under section 115-10.1 of the Code. *Morales,* 281 Ill. App. 3d at 701. Generally, a party may only use a prior inconsistent statement for impeachment purposes. *People v. Rodriguez,* 291 Ill. App. 3d 55, 62, 684 N.E.2d 128 (1997); *People v. Morgason,* 311 Ill. App. 3d 1005, 1010, 726 N.E.2d 749 (2000). However, as previously mentioned, section 115-10.1 of the Code allows, in pertinent part, a witness, written or

signed prior inconsistent statement, not made under oath, to be admitted as substantive evidence where the statement narrates, describes, or explains an event or condition of which the witness had personal knowledge, and the witness is subject to cross-examination concerning the statement at the current proceeding. 725 ILCS 5/115-10.1(a), (b), (c)(2)(A) (West 1998).

The issue here is whether Alston, Frazier, and Johnson's respective recantation statements satisfy the "personal knowledge" requirement set forth in subsection (c)(2) of section 115-10.1 of the Code. "Personal knowledge" as used in subsection (c)(2), means that the witness whose prior inconsistent statement is being offered into evidence must have actually seen the events that are the subject of the statement. *Rodriguez,* 291 Ill. App. 3d at 62, citing *People v. Cooper*, 188 Ill. App. 3d 971, 973, 544 N.E.2d 1273 (1989). The personal knowledge requirement contained in subsection (c)(2) limits the use of out-of-court statements to those events the witness actually observed. *People v. Fields,* 285 Ill. App. 3d 1020, 1028, 675 N.E.2d 180 (1996). In order to satisfy the personal knowledge requirement of the statute, "the witness must have observed, and not merely heard, the subject matter underlying the statement." *Morgason,* 311 Ill. App. 3d at 1011, quoting *People v. Hastings,* 161 Ill. App. 3d 714, 720, 515 N.E.2d 260 (1987). The question of personal knowledge is to be determined from the face of the statement and not from subsequent testimony of the recanting witness. *People v. Fauber,* 266 Ill. App. 3d 381, 390, 640 N.E.2d 689 (1994).

In the instant case, a review of the respective recantation statements of Alston, Frazier, and Johnson indicate that these witnesses did not have any personal knowledge

of the events occurring on the night of A.Z.'s murder. For example, in their recantation statements, Alston, Frazier, and Johnson all state that they never saw defendant on June 19, 1995, the night of the shooting incident. The statements do not say where defendant was on the night of the shooting incident, the statements do not reveal what happened at defendant's house before or after the shooting, and the statements do not indicate how A.Z. was shot. Thus, the recantation statements clearly indicate that Alston, Frazier, and Johnson had no personal knowledge of any events at issue in this case. Even if the statements were construed as demonstrating personal knowledge that the declarant was not in defendant's presence on the night of the shooting, this would not suffice as personal knowledge of an event at issue in the case. See *People v. Redd*, 135 Ill. 2d 252, 302, 553 N.E.2d 316 (1990) (stating that in relation to section 115-10.1 of the Code, "[su]bstantive evidence is evidence which is 'adduced for the purpose of proving a fact in issue, as opposed to evidence given for the purpose of discrediting a witness * * * or of corroborating his testimony' "). The recantation statements were not admissible under subsection (c)(2), and therefore the trial court did not abuse its discretion in not admitting the statements as substantive evidence under section 115-10.1 of the Code.

In the alternative, defendant argues that if the trial court determined that certain portions of the recantation statements failed to satisfy the "personal knowledge" requirement of subsection (c)(2), then the court should have redacted those portions and admitted the remainder of the statements as substantive evidence, rather than exclude the statements entirely. Defendant's alternative argument has no merit.

Although the remainder of the statements conforms superficially with the requirements of the statute, any inconsistencies between these statements and the respective trial testimony of Alston, Frazier, and Johnson, are insignificant and do not relate to the credibility of these witnesses in such a fashion that had the statements been considered as substantive evidence by jurors the outcome would have been different. Again, in their recantation statements, Alston, Frazier, and Johnson all state that they never saw defendant on the night of the shooting incident. The statements do not say where defendant was on the night of the shooting. Thus, the admissible evidence contained in the statements shed no light whatsoever on the issue of whether defendant was criminally responsible for the shooting death of the victim.

III. Motion to Suppress

Defendant next contends that since he never made a valid waiver of his *Miranda* rights, the trial court erred by denying his motion to suppress alleged inculpatory statements he made to ASA Thomas. Evidence was presented that on the morning of June 27, 1995, ASA Thomas initiated a preliminary interview with defendant regarding the shooting incident. After defendant was advised of his *Miranda* rights and he requested an attorney, the interview was terminated. About 1½ hour later, as defendant was being escorted to the washroom, he shouted to ASA Thomas that he wanted to talk with her. After ASA Thomas responded that she could not speak with defendant, defendant replied that he wanted to speak with the assistant state's attorney.

Minutes later, as defendant was being escorted back from the washroom, he again shouted to ASA Thomas that he wanted to speak with her. ASA Thomas then asked defendant if he was sure that he wanted to waive his right to an attorney, to which defendant replied "yes." ASA Thomas testified that when defendant was brought into the interview room, she again asked defendant if he was sure that he wanted to waive his right to an attorney. ASA Thomas testified that defendant indicated that he understood his rights. Defendant then stated that he wanted to cut a deal, stating that he would tell where the guns were if he could cut a deal.

When ASA Thomas responded that she did not have the power to cut a deal with defendant, defendant continued talking, stating that as he was driving a couple of the "defendants" to the park, he had "tried to talk them out of it." Defendant again asked if he could cut a deal, to which ASA Thomas again replied that she did not have the power to cut a deal with defendant. Defendant eventually asked for an attorney, whereupon ASA Thomas terminated the conversation.

Defendant now maintains that once he was brought into the interview room a second time to speak with ASA Thomas and she again asked him if he wanted to waive his right to an attorney, he did not specifically respond to the question. Defendant asserts that under these circumstances the failure of law enforcement authorities to readvise him of his *Miranda* rights rendered his inculpatory statement involuntary. We must disagree with defendant.

During a custodial interrogation, when an accused invokes his right to counsel after being advised of his

Miranda rights, interrogation by law enforcement authorities must cease until the accused has had an opportunity to confer with an attorney. *People v. Olivera,* 164 Ill. 2d 382, 389-90, 647 N.E.2d 926 (1995), citing *Miranda v. Arizona,* 384 U.S. 436, 474, 16 L. Ed. 2d 694, 723, 86 S. Ct. 1602, 1628 (1966). The accused may not be subject to further interrogation without the presence of counsel unless the accused himself initiates further communication, exchanges, or other conversations with the police. *People v. Woolley,* 178 Ill. 2d 175, 197, 687 N.E.2d 979 (1997), citing *Edwards v. Arizona*, 451 U.S. 477, 485, 68 L. Ed. 2d 378, 386, 101 S. Ct. 1880 (1981).

The following two-part inquiry is used to determine if an accused's statement made in the absence of counsel and following the accused's request for counsel, is admissible as substantive evidence: (1) Whether the accused, after invoking his right to counsel, initiated further conversation evincing a willingness and desire for a generalized discussion about the investigation; and (2) whether the totality of the circumstances, including the fact that the accused reopened dialogue with law enforcement officials, indicates that the accused knowingly and intelligently waived his right to the presence of counsel during questioning. *Woolley,* 178 Ill. 2d at 198-99, citing *Oregon v. Bradshaw,* 462 U.S. 1039, 1044-46, 77 L. Ed. 2d 405, 411-13, 103 S. Ct. 2830, 2834-35 (1983).

The State has the burden to show, by a preponderance of the evidence and under the totality of the circumstances, that the events subsequent to the accused's invocation of his right to counsel, indicate a waiver of that right. *People v. Smith,* 306 Ill. App. 3d 82, 87, 713 N.E.2d 140 (1999). The trial court's decision regarding this issue will not be disturbed unless it is manifestly erroneous.

Smith, 306 Ill. App. 3d at 87. Here, we are hampered in our review because defendant failed to include a complete transcript of the suppression hearing in the record. Therefore, we must assume that the trial court, in finding defendant's statement voluntary, determined that the State witnesses were credible. Thus, we will review *de novo* the ultimate question of voluntariness based on the record and the facts presented by the State.

As previously indicated, defendant contends that even if his initial statements to ASA Thomas can be characterized as an initiation of further discussion, his subsequent statements made in the interview room should have been suppressed because ASA Thomas did not readvise him of his *Miranda* rights. We must reject defendant's contention. Generally, a law enforcement officer is required to readvise the accused of *Miranda* warnings when the officer says or does something, other than those actions normally accompanying arrest and custody, that the officer should know is reasonably likely to elicit an incriminating response from the accused. *Olivera,* 164 Ill. 2d at 391-92; *Smith*, 306 Ill. App. 3d at 89.

In the instant case, the evidence reveals that when defendant was brought into the interview room a second time, ASA Thomas again asked defendant if he was sure that he wanted to waive his right to an attorney. In response, defendant indicated that he understood his rights. Defendant then stated that he wanted to cut a deal, stating that he would tell where the guns were if he could cut a deal. When ASA Thomas again responded that she did not have the power to cut a deal with defendant, defendant continued talking, stating that as he was driving a couple of the "defendants" to the park, he had "tried to talk them out of it." On this record, we cannot say

that ASA Thomas' words or actions could be interpreted as reasonably likely to elicit an incriminating response from the defendant. The record indicates that ASA Thomas asked questions specifically designed to insure that defendant understood his rights, not to provoke an incriminating response.

IV. Prior Conviction Admissible to Impeach

Next, defendant contends and the State concedes that the trial court erred in admitting defendant's 17-year-old burglary conviction for the purposes of impeachment. However, the State goes on to argue that the error was harmless, since the brief mention of the prior conviction had no impact on the fairness of defendant's trial. In response, defendant maintains that the State did not meet its burden of showing that the error was harmless.

A trial court's decision allowing a defendant's credibility to be impeached through the use of a prior criminal conviction is a matter within the court's discretion. *People v. Williams*, 173 Ill. 2d 48, 81, 670 N.E.2d 638 (1996). In *People v. Montgomery*, 47 Ill. 2d 510, 516-19, 268 N.E.2d 695 (1971), our supreme court adopted proposed Rule 609 of the Federal Rules of Evidence (Fed. R. Evid. 609), regarding the admissibility of a criminal defendant's prior conviction for impeachment purposes. See *People v. Hawkins*, 243 Ill. App. 3d 210, 222-23, 611 N.E.2d 1069 (1993). Under *Montgomery*, a prior conviction is admissible to impeach the credibility of a testifying defendant if: (1) the conviction was for a crime punishable by death or imprisonment for more than one year; or (2) the conviction was for a crime involving dishonesty or false statement. In addition, in either case, the prior conviction is not admissible

if: (1) it is more than 10 years old; or (2) the conviction's probative value is substantially outweighed by the danger of unfair prejudice. *Montgomery,* 47 Ill. 2d at 516.

As previously mentioned, the State acknowledges that defendant's January 1986 burglary conviction was too remote in time to be admissible as impeachment evidence under the *Montgomery* 10-year rule, but goes on to argue that the trial court's error in this regard was harmless. Defendant responds that the State has not met its burden of showing that the error was harmless.

Harmless error is determined by considering the entire record and the particular facts of each case. *People v. Dunn*, 326 Ill. App. 3d 281, 287, 760 N.E.2d 511 (2001). In order for a trial error to be considered harmless, there must be no reasonable probability that the outcome of the trial would have been different if the error had not occurred. *People v. Flournoy,* 336 Ill. App. 3d 739, 746, 784 N.E.2d 353 (2002). In this case, a review of the evidence leads us to conclude that there is no reasonable probability that the verdict would have been different had the evidence of defendant's prior burglary conviction not been admitted.

Disclosure of the impeaching burglary conviction was minimal. The direct inquiry comprised six lines of transcript and mainly consisted of a single question that was answered in the affirmative:

> "[Defense counsel]: So, you were 25 years old back in 1986?
>
> [Defendant]: Yes. Well, –
>
> [Defense counsel]: And were you convicted of burglary then?

[Defendant]: Yes, I was.

[Defense counsel]: Back then?

[Defendant]: Yes."

Nothing more was said about the burglary conviction on direct examination and the prosecutor asked nothing about the conviction on cross-examination or in closing argument. The trial lasted four days and the record is relatively lengthy. Under these circumstances it is not reasonably probable that a single question regarding defendant's burglary conviction could have been a material factor in the jury's determination of defendant's guilt such that without the evidence of the prior conviction the outcome of the murder trial would have been different.

Second, regardless of the admission of defendant's prior conviction for burglary, defendant's credibility was impeached by properly admitted evidence of defendant's prior criminal activity. For example, defendant admitted on direct examination that he was a member of the BDs for 5 years and attained the rank of co-minister in the gang's drug selling operation until sometime in 1993 or 1994. In sum, nothing in the record suggests that defendant was convicted based on anything other than the properly admitted evidence against him establishing his participation and planning of the June 19, 1995, fatal shooting. Accordingly, the trial court's error in allowing admission of defendant's prior burglary conviction for the purpose of impeaching defendant's credibility was harmless error.

V. Jury Instruction

Defendant next maintains that the trial court committed reversible error in refusing to issue his tendered instruction on the lesser offense of involuntary manslaughter, arguing that there was evidence in the record that would permit the jury to find him guilty of involuntary manslaughter rather than murder. Defendant contends that the evidence supported an instruction on involuntary manslaughter since the jury could have reasonably believed that he did not intend to kill rival gang members but only to scare them. The State responds that the trial court did not err because the evidence does not indicate that defendant acted recklessly. We agree with the State.

We review a trial court's refusal to issue a tendered jury instruction under an abuse of discretion standard. *People v. Williams,* 315 Ill. App. 3d 22, 31, 732 N.E.2d 767 (2000). When there is credible evidence in the record that would reduce the crime from murder to manslaughter, an instruction defining the lesser crime should be given, even where the evidence is very slight. *People v. Jefferson,* 260 Ill. App. 3d 895, 911, 631 N.E.2d 1374 (1994); *People v. Jones,* 175 Ill. 2d 126, 132, 676 N.E.2d 646 (1997). However, an involuntary manslaughter instruction is not warranted where the evidence reveals that the defendant voluntarily and willfully committed an act that had the natural tendency to cause death or great bodily harm. *People v. Foster,* 119 Ill. 2d 69, 87-88, 518 N.E.2d 82 (1987).

The basic difference between involuntary manslaughter and first-degree murder is the mental state that accompanies the conduct resulting in the victim's death. *People v. Eason*, 326 Ill. App. 3d 197, 209, 760 N.E.2d 519

(2001), citing *People v. DiVincenzo*, 183 Ill. 2d 239, 249, 700 N.E.2d 981 (1998). Murder requires the intent to kill or do great bodily harm, or knowledge that one's acts create a strong probability of death or great bodily harm (720 ILCS 5/9-1(a)(1), (2) (West 1998)), while involuntary manslaughter requires only reckless conduct which causes death (720 ILCS 5/9-3(a) (West 1998)). In regard to reckless conduct the statute provides:

> "A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation."

In the instant case, it is highly doubtful that a jury could have believed that defendant merely acted recklessly when he ordered his fellow gang members to "spray" rival gang members with bullets, or where after he was told about the shooting, he allegedly responded that he expected to see "something in the newspaper," or see "some ambulances or something." Granted, there was no evidence presented that the female victim was targeted. However, the evidence clearly established that rival gang members were targeted.

Defendant's contention that he did not intend to kill rival gang members but only to scare them, was insufficient to create a jury question on the issue of recklessness. Our courts have held that when a defendant intends to fire a gun, points that gun in the general direction of his intended victim and shoots, such conduct is not reckless, regardless of the defendant's claim that he did not intend to kill anyone. *Jefferson*, 260 Ill. App. 3d at 912; *Eason,*

326 Ill. App. 3d at 209-10. Therefore, the trial court did not err in denying defendant's request for an involuntary manslaughter instruction.

VI. Shifting the Burden of Proof

Defendant next contends that the prosecutor shifted the burden of proof during closing argument when he commented on defendant's failure to call three alibi witnesses. Defendant has waived this issue by failing to object to the prosecutor's comment at trial. An allegation that a prosecutor's comment made during closing argument was in error, is waived on appeal if the defendant fails to object to the comment at trial and raise the issue in a post-trial motion. *People v. Durham,* 252 Ill. App. 3d 88, 95, 623 N.E.2d 1010 (1993). In addition, since the evidence was not closely balanced or the alleged error so fundamental that it denied defendant a fair trial, the plain error rule is inapplicable. See *People v. Thomas,* 178 Ill. 2d 215, 235, 687 N.E.2d 892 (1997) (stating that a reviewing court should examine a waived issue under plain error doctrine where the evidence is closely balanced or the alleged error is so fundamental that it denies defendant a fair trial). Nonetheless, even absent waiver, defendant's contention would fail.

Throughout a trial, the burden of proof never shifts to the accused, but remains the responsibility of the prosecution. *People v. Weinstein,* 35 Ill. 2d 467, 470, 220 N.E.2d 432 (1966). Therefore, even though the prosecutor is allowed a great deal of latitude in making his opening statement and closing argument, improper argument by the prosecution attempting to shift the burden of proof to a

defendant constitutes reversible error. *People v. Yonker,* 256 Ill. App. 3d 795, 798, 628 N.E.2d 1124 (1993).

Generally, it is improper for a prosecutor to attempt to shift the burden of proof to the defendant by commenting on defendant's failure to call witnesses when such witnesses are equally accessible to both parties. *People v. Brown,* 222 Ill. App. 3d 703, 718, 584 N.E.2d 355 (1991). However, an exception to this general rule exists where the defendant is responsible for injecting a potential alibi witness into the case, and then fails to produce that witness at trial. See *People v. Kubat*, 94 Ill. 2d 437, 498, 447 N.E.2d 247 (1983) (stating, "where a defendant injects into the case the name of an alibi witness and then fails to call the witness, the prosecutor may legitimately comment on the lack of such evidence although it may not be relied upon as proof of the charge").

Here, the existence of potential alibi witnesses was interjected into the case by the defendant. Defendant's alibi defense was that at the time the offense was committed, he had left the Inter-City Youth Foundation, located at 4500 South Michigan Avenue, and was driving three students from the foundation to their respective homes. See *People v. Woods,* 292 Ill. App. 3d 172, 176, 684 N.E.2d 1053 (1997) (noting that a defendant may inject alibi witnesses into a case through his own testimony). On cross-examination, defendant testified that he could not remember the names of the three students. During closing argument, the prosecutor responded to defendant's lack of memory regarding the students' names, stating, "You know, and this supposed alibi, where are these students? He can't even name any of the students. Wouldn't that be something important or if he knows them from the Youth Foundation, he's going to know their names if he actually

worked there like he did." Since the existence of the three student witnesses who would provide defendant's alibi was interjected by the defendant himself, the prosecutor's comment regarding defendant's failure to produce these witnesses at trial was not improper. See *People v. Jackson,* 299 Ill. App. 3d 104, 111-12, 700 N.E.2d 736 (1998); *People v. Lewis,* 243 Ill. App. 3d 618, 627, 611 N.E.2d 1334 (1993); *People v. Brooks,* 297 Ill. App. 3d 581, 584, 697 N.E.2d 343 (1998).

VII. Reasonable Doubt

Lastly, defendant contends that the State failed to prove him guilty beyond a reasonable doubt, arguing that telephone records and hospital emergency room records that were admitted into evidence set forth a timeline, which made the State's theory of the case physically impossible. Defendant maintains that telephone calls placed from his house to the homes of Eddie Frazier and Jamal Harmon on the date of the shooting, make it impossible for him to have committed the offense in the manner described by the State witnesses.

Defendant argues that if his home phone was used by Eddie Frazier at 9:05 p.m. to return his father's page, and Frazier left defendant's house immediately after speaking with his father, and the shooting occurred at 9 p.m. or very shortly thereafter, then it would have been physically impossible for defendant and his fellow gang members to have had enough time to plan and then execute the 9 p.m. shooting after Fraizer left defendant's home in response to the page. We disagree.

Fraizer testified at trial that on the date of the shooting, he arrived at defendant's house at approximately 8

p.m. At the time, defendant was discussing plans for the shooting with fellow gang members. After about 10 to 15 minutes, Fraizer received a page from his father. Fraizer went upstairs in defendant's house and used defendant's telephone to return his father's page. After speaking with his father, Fraizer went home. Fraizer testified that he was not at defendant's house when everyone left for the park to carry out the shooting. Fraizer returned to defendant's house approximately 45 minutes later.

The record does not indicate that Fraizer's testimony renders it physically impossible for defendant to have participated in the offense. For example, the record shows that defendant was discussing plans for the shooting with other gang members before Fraizer arrived at defendant's house. Evidence was presented that it took less than five minutes to drive from defendant's house to the park. Evidence was also presented that after defendant drove to the park and left his fellow gang members there to do the shooting, he and April Alston arrived back at his house within approximately 10 minutes. This timeline evidence makes it entirely possible for someone at defendant's house to have placed a telephone call from the house to Fraizer's home at 9:05 p.m., in order to inform Fraizer that the retaliatory shooting had been carried out, either just before the shooting actually occurred or even while it was occurring.

Defendant assumes that the call made from his house to Fraizer's house at 9:05 p.m., is the call Fraizer made returning his father's page. However, this is not the only possible scenario. It is also quite possible that Fraizer returned his father's page at approximately 8:15 p.m., as he testified, but that he used defendant's cellular telephone or someone else's cellular telephone instead of

defendant's landline. Evidence was presented that defendant owned and used a cellular telephone. It is also possible that after defendant and his fellow gang members left for the park, someone who stayed behind at defendant's house called Fraizer's house. In short, telephone records showing that a telephone call was placed from defendant's house to Fraizer's house at 9:05 p.m., does not conclusively prove anything about the timeline of the actions that led to A.Z.'s death.

Defendant also contends that if a telephone call was placed from his house to Jamal Harmon's house at 9:06 p.m., as telephone records show, then it would have been physically impossible for Harmon to have left his house after receiving the call at 9:06 p.m., drive to defendant's house, participate in a discussion on the front porch of defendant's house regarding the planned shooting, retrieve firearms from defendant's house, drive to Marquette Park where the shooting occurred, participate in the shooting, and still have the victim being examined in the hospital emergency room at 9:20 p.m.

Again, defendant assumes that Harmon was at home to receive the 9:06 p.m. telephone call. It is possible that the call was placed by someone at defendant's house, after the shooting, who thought that Harmon headed home once he left the park. Harmon did not testify, and there was no evidence presented that he arrived at defendant's house in response to a telephone call from defendant.

Where a defendant challenges the sufficiency of the evidence to support his conviction, the relevant inquiry for a reviewing court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense

beyond a reasonable doubt. *People v. Pryor,* 282 Ill. App. 3d 92, 97, 668 N.E.2d 1090 (1996). "Under this standard, a reviewing court will not substitute its judgement for that of the trier of fact on issues of weight of evidence or the credibility of witnesses." *People v. Belk*, 326 Ill. App. 3d 290, 296, 760 N.E.2d 118 (2001).

It is the jury's function to determine the accused's guilt or innocence, and a conviction will not be overturned unless the evidence is so improbable as to justify a reasonable doubt of defendant's guilt. *People v. Eyler,* 133 Ill. 2d 173, 191, 549 N.E.2d 268 (1989). The trier of fact must evaluate the inferences to be drawn from the evidence, assess the credibility of the witnesses, determine the weight to be given their testimony and resolve any evidentiary conflicts. *People v. Young,* 128 Ill. 2d 1, 51, 538 N.E.2d 461 (1989). Moreover, a jury is not required to accept defendant's version of events but rather must consider the probability or improbabilities of his testimony, the circumstances surrounding the incident, and the testimony of other witnesses. *People v. Ranola,* 153 Ill. App. 3d 92, 98, 505 N.E.2d 1191 (1987).

In the present case, the jury was not required to accept defendant's version of events. Defendant argued his timeline theory extensively to the jury, using a chart as demonstration. The jury obviously rejected defendant's theory when it found him guilty. On this issue, it is not our province to second-guess the jury's verdict or retry defendant on appeal. See *People v. Lee,* 342 Ill. App. 3d 37, 49, 795 N.E.2d 751 (2003) (stating, "[t]he credibility of witnesses and the weight given their testimony are primarily within the province of the fact finder"); *People v. Sykes,* 341 Ill. App. 3d 950, 982, 793 N.E.2d 816 (2003) (stating that it is not the function of a reviewing court to retry a

defendant or substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of witnesses). Our review of the presented evidence indicates that the jury could have found the essential elements of the crime proven beyond a reasonable doubt. We, therefore, hold that the evidence in this case was sufficient to support defendant's conviction.

Accordingly, for the reasons set forth above, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

HALL, J., with HOFFMAN, P.J., and KARNEZIS, J., concurring.

2007 Ill. LEXIS 929,*

1 of 1 DOCUMENT

People State of Illinois, respondent, v. Michael Thompson, petitioner.

No. 98019

SUPREME COURT OF ILLINOIS

2007 Ill. LEXIS 929

May 31, 2007, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY:

Leave to appeal, Appellate Court, First District. (1-02-1964).

OPINION

Petition for leave to appeal denied.

RE: INVESTIGATION (FATAL SHOOTING OF ARACELI ZIZUMBO)

STATEMENT

of

EUGENE WISEMAN,

taken in an interview room, 2nd floor, Area 1 Headquarters, 51st and Wentworth, Chicago, Cook County, Illinois, on June 27, 1995, at 11:59 a.m.

PRESENT: MR. JAMES G. PIPER, JR.
MS. DOMINICA STEPHENSON
Assistant State's Attorney

Detective T. Coughlin,
Star No. 20983
Area 1 Violent Crimes

Reported By: Janet K. Lupa

Book No. 9506-27

MR. PIPER: Let the record reflect that we are in a room at Area 1 Violent Crimes. Today's date is June 27, 1995. The time is 11:59 a.m.

Present in the room with me, Assistant State's Attorney James G. Piper, Jr., are Detective Thomas Coughlin, Star No. 20983 and Assistant State's Attorney Dominica Stephenson, the court reporter, and Eugene Wiseman.

We are here to take the statement of Eugene Wiseman [2] concerning the investigation of the fatal shooting of Araceli Zizumbo which occurred on June 19, 1995 at approximately 9:25 p.m. at 6930 South Redfield, Chicago, Cook County, Illinois.

EXAMINATION

BY MR. PIPER:

Q. Eugene Wiseman, I talked to you earlier and explained that I am an Assistant State's Attorney, a lawyer and prosecutor, and not your lawyer; is that correct?

A. Yes.

Q. And before we spoke, I advised you of your constitutional rights, is that correct?

A. Yes.

Q. I am going to read you your rights again.

Do you understand that you have a right to remain silent?

A. Yes.

Q. Do you understand that anything you say can be used against you in a court of law?

A. Yes.

Q. Do you understand you have the right to talk to a lawyer and have him present with you while you are being questioned?

A. Yes.

Q. Do you understand if you cannot afford to hire a lawyer, and you want one, a lawyer will be appointed by the Court to [3] represent you before any questioning?

A. Yes.

Q. Understanding these rights, do you wish to talk to us now?

A. Yes.

Q. Now, Eugene, your full name is Eugene Wiseman, is that correct?

A. Yes.

Q. And do you have a nickname?

A. Yes.

Q. What is that nickname?

A. Mann.

Q. Now, Eugene, how old are you?

A. 18.

Q. And what is your date of birth?

A. February 15, 1977.

Q. Now, how far did you go in school?

A. Sophomore.

Q. Do you read English?

A. A little.

Q. Do you write English?

A. A little.

Q. Now, earlier today did you read the first sentence from [4] the article entitled "Aunt Won't Kill Cat to Save Girl From Rabies Shots" from the Chicago Sun-Times, Monday, June 26, 1995 edition?

A. Yes.

Q. That article was on the first page, correct?

A. Yes.

Q. And you didn't have any difficulty reading that first sentence, correct?

A. No[, I had no difficulty. /s/ JP E.W. DAS T.C.]

Q. Now, Eugene, where do you stay?

A. 7216 South Claremont.

Q. And with whom do you stay?

A. My sisters.

Q. And do you have a girlfriend right now?

A. Yes.

Q. What is her name?

A. Kelly Collins.

Q. And do you have a child with her?

A. Yes.

Q. And is that a boy or a girl?

A. A girl.

Q. What is your daughter's name?

A. Shannon.

Q. Now, Eugene, do you belong to a gang?

[5] A. Yes.

Q. What gang is that?

A. Black Disciples.

Q. How long have you belonged to the Black Disciples?

A. A year and a half.

Q. Now, Eugene, I want to focus your attention to June 19, 1995, now on June 19, 1995 did you hear about something unusual th[at /s/ JP E.W. DAS T.C.] took place on June 18, 1995?

A. Yes.

Q. Who told you this?

A. Jamal.

Q. Now, how long have you known Jamal?

A. For a year and a half..

Q. Is Jamal also a Black Disciple?

A. Yes, Black Disciple.

Q. And is the short name for that Black Disciple BD?

A. Yes.

Q. I'm showing you what's been marked as Exhibit No. 1, just the front of the exhibit No. 1, is that correct?

A. Yes.

Q. Do you recognize the person in this photograph?

A. Yes.

Q. Who do you recognize it as?

[6] A. Jamal.

Q. What did Jamal tell you on June 19, 1995 about what happened on June 18, 1995?

A. Told me that Eddie got shot in the head.

Q. Now, who is Eddie?

A. My First Demetrius.

Q. What does First Demetrius mean?

A. ~~Meaning~~ [It means /s/ JP E.W. DAS T.C.] he call it for the block.

Q. And by saying he calls it for the block does that mean he decides what goes on on the block?

A. Yes.

Q. Is he a BD as well?

A. Yes.

Q. I'm showing you an exhibit marked Exhibit No. 2, I'm showing you the front of that exhibit, correct?

A. Yes.

Q. Do you recognize the person in this picture?

A. Yes.

Q. Who is that?

A. Eddie.

Q. And did Jamal tell you who shot Eddie?

A. Yes.

Q. Who was that?

[7] A. KGB's.

Q. What does KGB stand for?

A. Krazy Get Down Boys.

Q. Is that another gang?

A. Yes.

Q. And is that an opposing gang or enemy gang?

A. Enemy gang .

Q. Now, did Jamal tell you if somebody was with Eddie when he had this trouble with the KGB's?

A. Yes.

Q. Whc was that?

A. Derrick.

Q. Who is Derrick?

A. BD.

Q. He's a BD as well?

A. Yes.

Q. How long have you known Derrick?

A. For about five, six months.

Q. What is his position in the gang?

A. COS.

Q. What is a COS?

A. Chief of Security.

Q. Now, is Eddie's position in the gang higher than [8] Derrick's?

A. Yes.

Q. I'm showing you an exhibit marked Exhibit No. 3, just the front of that exhibit, correct?

A. Yes.

Q. Do you recognize the person in this photograph?

A. Yes.

Q. Who do you recognize it as?

A. Derrick.

Q. Now, you have told us that Derrick was a COS, is that correct?

A. Yes.

Q. And Eddie is a First Demetrius, is that correct?

A. Yes.

Q. What is Jamal's position?

A. Didn't have a position.

Q. He's a soldier, is that correct?

A. Yes.

Q. Is that your position as s[/s/ JP E.W. DAS T.C.]well?

A. Yes.

Q. Now, when Jamal told you about what happened to Eddie with the KGB's the day before, what happened

then? Did you go some [inserted space /s/ JP E.W. DAS T.C.] place?

[9] A. Yes.

Q. Where did you go?

A. To look for the KGB's.

Q. Where did you go to look for them?

A. In the park.

Q. What park is that?

A. Marquette Park.

Q. And did you actually go to Marquette Park?

A. Yes.

Q. Did you go there with Jamal?

A. Yes.

Q. When you got to the park what did you see?

A. The KGB's on the bridge.

Q. And were there a few or a lot of KGB's on the bridge?

A. A lot.

Q. When you and Jamal went to look for KGB's did you go alone or did some other BD's go with you?

A. Yes.

Q. Who went with you?

A. Mickey, Putt, that's it.

Q. Now, when you saw that there were a lot of KGB's at Marquette Park what did Jamal do?

A. He told us to throw up the fork?.

[10] Q. And did you throw up the fork?

A. Yes.

Q. What does that mean? What does that signify?

A. GD's.

Q. When you say GD's what do you mean?

A. Another gang.

Q. What gang is that?

A. Gangster Disciples.

Q. And when you threw up the fork what happened then?

A. They didn't touch us.

Q. And why did you throw up the fork?

A. So they wouldn't shoot at us.

Q. And when you say they do you mean the KGB's?

A. Yes.

Q. Now, after you and the other BD's threw up the fork and the KGB's did not touch you, what happened then?

A. One of them recognized us and told them.

Q. What did you do?

A. We drove off.

Q. Where did you go from that point?

A. To my girlfriend's house.

Q. And at your girlfriend's house what happened?

A. I got out the car and we started talking to the dude that [11] was sitting on the porch.

Q. And after you talked to the dude on the porch what happened then?

A. We went over to Mike's house.

Q. Who is Mike?

A. Co-Min, Co-Minister.

Q. What does Co-Minister mean?

A. It means he got the whole area from Halsted to Kedzie.

Q. So Mike is also a BD?

A. Yes.

Q. Is his rank higher than Eddie and Derrick?

A. Yes.

Q. I'm showing you an exhibit marked Exhibit 4,just the front of that picture, correct?

A. Yes.

Q. Do you recognize the person in that picture?

A. Yes.

Q. Who do you recognize that as?

A. Mike.

Q. Do you have a nickname you call Mike?

A. Yes, Mike D.

Q. Now, when you say that Mike D has the whole area what do you mean?

[12] A. It means he call it for everybody from the 50's to the 70's, 79th – to 79th.

Q. When you say he calls it, does that means he decide, what happens?

A. Yes.

Q. Now, when you went to see Mike D with Jamal, what happened then?

A. We sitting on the porch and Mike D said, yeah, he asked Jamal did he know where they be at, and he said, yeah, in the park.

Q. When you say he asked where they be at who do you mean?

A. KGB's.

Q. What did Jamal say?

A. At the park.

Q. What happened then?

A. Jamal say we want to go in the park and get them and Mike D said let him see where the place they was at and he'd find a way.

Q. When Jamal said he wanted to go get them what did you understand that to mean?

A. To shoot at them.

Q. And then after Jamal said that what did Mike D say?

A. Mike D, he was like, come over, we going to get in the car ang we be fitting' to see how we going to do it, how we going to play it.

[13] Q. Now, what Mike and Jamal were talking about going to get the KGB's who was there other than yourself?

A. A whole bunch of us.

Q. A whole bunch of BD's?

A. Yes.

Q. And then what did Mike D and Jamal do if anything at that time?

A. They got in the car and they rode around looking for them, how to get them, how to set it up.

Q. How to set up the shooting at the KGB's?

A. Yes.

Q. Were you there when they came back?

A. Yes.

Q. What happened then when they came back?

A. Mike said it's going to be easy as taking candy from a baby.

Q. What happened then?

A. He asked where everybody was at.

Q. Why did he ask that?

A. Because somebody was supposed to go with him to do the shooting.

Q. What happened after he asked that?

A. He told me I was going with him.

[14] Q. And then what did you do?

A. We stagged for a little while. He told April to get the fuck off the porch.

Q. Who is April?

A. A first lady of all the BD's.

Q. And I'm showing you an exhibit which has been marked Exhibit No. 5, just the front of that exhibit, correct?

A. Yes.

Q. Do you recognize the person in this photograph?

A. Yes.

Q. Who do you recognize it as?

A. April D.

Q. And now when Mike D told her to get off the porch what did she do?

A. She got off the porch and got in the car with Craig.

Q. And what happened then?

A. Me and Pretty Ricky jumped in the car with Craig and then Mike was like, you all stupid, so I got out their car and went to the car Mike and them was in.

Q. How many cars were there?

A. Two.

Q. Who was in the car with April?

A. Craig.

[15] Q. Was that Craig's car?

A. Yes.

Q. What car were you in?

A. The blue one.

Q. And who was in control of that car?

A. Mike.

Q. And who else was in the car other than Mike and you?

A. Jamal and Pretty Ricky.

Q. And then where did the two cars go at that time?

A. To 70th across from California.

Q. Whose car was Mike driving?

A. Jamal's.

Q. That was the blue car, correct?

A. Yes.

Q. Which car was Craig driving?

A. A red four-door.

Q. That's his car?

A. Yes.

Q. Now, both cars went to Marquette Park, is that correct?

A. Yes.

Q. What happened when you got to the park?

A. We got out the car and Mike told April to get in the car with him. April got in the car with him and Mike drove off. We [16] stood out the car and Mike pulled –.

Q. Who got out? Did anyone get out of Mike's car?

A. Yeah.

Q. Who got out of Mike's car?

A. Me, Jamal, and Pretty Ricky.

Q. And you, Jamal and Pretty Ricky, where did you go after you got out of the car?

A. To Craig's car.

Q. What happened when you got to Craig's car?

A. We stood there.

Q. And after you stood there what happened?

A. Mike pulled back and told us to get [~~ur~~ our /s/ JP E.W. DAS T.C.] ass in the park and take care of that.

Q. What did you understand that to mean?

A. Go shoot the KGB's.

Q. So after Mike D said that to you guys what did you do?

A. We got out the car. The bag was in the trunk. Craig grabbed the bag –

Q. Did everyone get out of the car?

A. Yes.

Q. Did Pretty Ricky get out of the car?

A. Yes.

Q. What happened then?

[17] A. Craig grabbed the bag. Mike pulled back up and told Craig pull the bag out and Pretty Ricky get in the car and turn the car.

Q. Did Pretty Ricky turn the car?

A. Yes.

Q. Did Craig still have the bag?

A. Yes.

Q. What was in the bag?

A. The guns.

Q. What happened when Craig took the bag with the guns out of the trunk?

A. We walked to the park.

Q. What happened? Where did you go in the park?

A. We sat at the bench.

Q. Who sat at the bench?

A. Me, Jamal, Craig.

Q. And how were you dressed at that time?

A. In black and white.

Q. Did you have black pants?

A. Yes.

Q. And what color was your shirt?

A. White.

Q. And do you remember what Craig was wearing?

[18] A. No.

Q. What was Jamal wearing?

A. All black.

Q. And after the three of you sat at the bench with the bag [~~what~~ that /s/ JP E.W. DAS T.C.] had the guns what happened then?

A. Craig start passing out the guns. Craig passed [Jamal /s/ JP E.W. DAS T.C.] a gun and then he passed me the gun.

Q. What kind of gun did Craig pass to Jamal?

A. Uzi

Q. And what kind of gun did he give ~~y—ou~~? [you /s/ JP E.W. DAS T.C.]

A. .38.

Q. What type of .38, a revolver or semiautomatic?

A. Revolver.

Q. And were those guns loaded?

A. Yes.

Q. And what kind of gun did Craig have?

A. A nine.

Q. .9 millimeter gun?

A. Yes.

Q. And after he passed out the guns what happened?

A. We walked over on the side. We walked on one side – We walked on one side of the path and Jamal came up the other side of the path.

[19] Q. Before you walked to the path and split up did you do anything with your hands at that time?

A. Before we got the guns we put on gloves.

Q. What kind of gloves did you put on?

A. Plastic.

Q. Where did you get the glove from?

A. Jamal – I mean Craig.

Q. Did Jamal receive a glove?

A. Yes.

Q. What kind of glove did he have?

A. Plastic.

Q. What kind of glove did Craig have?

A. Leather, black gloves.

Q. Did he have two gloves?

A. Yes.

Q. You and Jamal only had one glove?

A. Yes.

Q. And you received the gloves and the guns were issued to [~~y ou~~ you /s/ JP E.W. DAS T.C.] and you began to walk in the park, correct?

A. Yes.

Q. Now, where were you standing?

A. By a hill.

Q. In the park?

[20] A. Yeah, a hill of dust.

Q. Were you standing alone or was there someone there with you?

A. Craig was with me.

Q. Where was Jamal standing in relation to you and Craig?

A. On the grass on the other side of the path.

Q. Did you see any KGB's at that time?

A. Yes.

Q. Were they closer to you or closer to Jamal?

A. Closer to Jamal.

Q. And what happened when Jamal was on the other side of the path closer to the KGB's?

A. He let off a shot.

Q. After he let off a shot what did you do?

A. I heard other shots coming from this side but I don't know if it was his shot or what, so we started shooting back over here.

Q. Did you shoot your gun?

A. Yes.

Q. In what direction did you shoot your gun?

A. Towards KGB's.

Q. How many times did you shoot your gun?

A. Twice or three times.

[21] Q. What did Craig do?

A. He tried to shoot but his gun was jammed.

Q. What did you notice about Jamal after he shot the first time?

A. He started letting it off.

Q. What do you mean by that?

A. He started busting a lot of times, like pow-pow-pow-pow-pow-pow.

Q. So Jamal shot many times quickly with his gun?

A. Yes.

Q. Could you see in what direction he was shooting?

A. Yes.

Q. In which direction was that?

A. Towards the KGB's.

Q. Jamal shot first before the KGB's, is that correct?

A. Yes.

Q. Now, after you and Jamal were shooting in the direction of the KGB people what happened then?

A. Jamal start coming towards us and he broke and we broke on the side.

Q. Where did you go after that?

A. Back to the car.

Q. Who was in the car?

[22] A. Pretty Ricky.

Q. And whose car was that?

A. Craig's.

Q. When you go to the car what happened then?

A. We got to the car. We put the guns in the trunk. Then we got in the car.

Q. When you got back in the car what did you do?

A. We pulled off.

Q. After you pulled off – who was driving when you pulled off?

A. Craig.

Q. And who else was in the car other than yourself and Craig at that time?

A. Jamal and Pretty Ricky.

Q. Where did Craig drive to?

A. Back to Mike's house.

Q. Was Mike there when you got back?

A. Yes.

Q. What happened when you got to Mike D's house?

A. Jamal took the guns out the trunk, took them straight upstairs and Mike came down and he asked us what happened.

Q. What did you say?

A. We was like we busted them. And then Jamal was like, [23] man, I had to hit a couple because all I seen was people falling when we was walking away from them. Then Mike came to us and Craig said, I'm not going to lie to you, I didn't bust nothing because my gun jammed. And I said I busted about three times.

Q. You told Mike D you shot two or three times?

A. Yes.

Q. What was his response?

A. His response was, man, I just better hear something in the newspaper or [~~you~~ I'm /s/ JP E.W. DAS T.C.] going to see some ambulances or something.

Q. What did you understand him to mean by that?

A. He wanted to know business was took care of.

Q. You mean shooting at the KGB's when you say business?

A. Yes.

Q. When Jamal took the guns into Mike D's house were they inside something then?

A. Yes.

Q. What were they in?

A. A bag.

Q. That was the same bag they had taken out of the trunk?

A. Yes.

Q. Did you talk to Mike D again later?

A. Yes.

Q. Did you talk to him about the shooting?

[24] A. Yes.

Q. And did you talk to him on the phone or in person?

A. On the phone.

Q. What did he say to you?

A. He asked me – he told me that the police was looking for us and to lay low and don't show my face outside. And I was like all right. Then I was like, no, man, like, man, I'm just fittin' to go home .

Q. What did he say?

A. He said [~~son't~~ don't /s/ JP E.W. DAS T.C.] let me hear you tricking off on me.

Q. When he said that what did you understand that to mean?

A. Well, something is going to happen to me.

Q. Did he tell you anything to say to the police?

A. Yes.

Q. What was that?

A. That he had nothing to do with it. He was on the porch all the time.

Q. And is that the last time you talked to Mike about this incident, the shooting?

A. Yes.

Q. Now, Eugene, at the time of the shooting were you under the effects of alcohol?

A. No.

[25] Q. Were you under the effects of drugs at the time of the shooting?

A. No.

Q. What did you do with your glove that you had used at the time of the shooting?

A. I burnt it.

Q. Where did you burn it in?

A. In the garbage.

Q. Eugene, I'm showing you a piece of paper that's been marked Exhibit No. 6, [~~so~~ do /s/ JP E.W. DAS T.C.] you recognize that piece of paper?

A. Yes.

Q. What do you recognize it as?

A. My drawing.

Q. That's a drawing of what?

A. The park.

Q. There are numerous drawings on the piece of paper, one of them is a stick man with a J underneath it, what does that mean?

A. Jamal

Q. And that's where he was located in the park?

A. Yes.

Q. That's where he was located at the time of the shooting?

A. Yes.

Q. And there is also a stick man with the letter M [26] underneath it, what does that symbolize?

A. Me.

Q. And there is a stick man with the letter C underneath it, what does that symbolize?

A. Craig.

Q. There is a drawing with the word bench next to it, what does that symbolize?

A. That's where we was at. That's where we sat at.

Q. Is that where Craig handed out the guns?

A. Yes.

Q. There is a drawing with the word car next to it?

A. That's where the car was at

Q. Whose car was that?

A. Craig's.

Q. Was that the car you used to get away?

A. Yes.

Q. There are two drawings that have the letters [~~KGZ6~~ KGB /s/ JP E.W. DAS T.C.] above the, what does that symbolize?

A. Another gang.

Q. Does it describe their location in the park?

A. Yes.

Q. Now, the position of the stick man with the M below, the stick man with the C below it, the stick man with the J below, and [27] the position of the spot with the KGB's, that's the way the positions were at the time Jamal fired the first shot, is that correct?

A. Yes.

Q. And there is an arrow leading from it away from the one KGB, what does that signify?

A. When they ran out and started busting towards Jamal.

Q. When you say started busting towards Jamal, what do you mean by that?

A. Shooting towards him.

Q. Now, Eugene, how have you been treated by the Assistant State's Attorneys, myself, Miss Thomas and [M]~~m~~iss /s/ JP E.W. DAS T.C.] Stephenson?

A. Very good.

Q. How have you been treated by the police officers?

A. Very good.

Q. Have you been given anything to eat?

A. Yes.

Q. What have you been given to eat?

A. Some pancakes and sausage from McDonald's.

Q. Have you been given anything to drink?

A. Yes.

Q. What's that?

A. Orange juice.

[28] Q. Have you been allowed to go to the bathroom when you needed to?

A. Yes.

Q. How many times have you gone to the bathroom?

A. Four.

Q. [~~Where~~ /s/ JP E.W. DAS T.C.] Were you allowed to smoke any cigarettes?

A. Yes.

Q. And who gave you the cigarettes?

A. Officers and you and another attorney.

Q. Another State's Attorney?

A. Yes.

Q. Now, the whole time that we were talking now and when I talked to you earlier you weren't handcuffed, is that correct?

A. Yes.

Q. Now, no threats or promises have been made to you in return for your statement, correct?

A. No.

Q. It's correct that no threats or promises have been made to you?

A. Yes.

Q. Have you given this statement freely and voluntarily? [/s/ JP E.W. DAS T.C.]

A. Yes.

Q. Are you now free from the effects of drugs and alcohol?

[29] A. Yes.

Q. Eugene, the court reporter will now type up your statement and [~~you~~ we /s/ JP E.W. DAS T.C.] will then read over the entire statement together and you will be allowed to make any additions or corrections that [~~y ou~~ you /s/ JP E.W. DAS T.C.] wish, do you understand that?

A. Yes.

MR. PIPER: This will conclude the statement of Eugene Wiseman. The time is now 12:26 p.m.

/s/ X Eugene Wiseman

WITNESSES TO SIGNATURE:

/s/ ASA James G. Piper Jr.

/s/ ASA Dominica Stephenson

/s/ Thomas M. Coughlin